REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 37 OF 2017

TITUS KAMAU GACHANGA.....APPELLANT

-VERSUS-

WAHOGO EDWARD.....1ST RESPONDENT

CHARLES NYOIKE MURUGI.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Kangundo Hon. E. Agade, RM delivered on the 3rd March, 2017 in Kangundo PMCC No. 55 of 2015)

BETWEEN

TITUS KAMAU GACHANGA.....PLAINTIFF

-VERSUS-

WAHOGO EDWARD.....1ST DEFENDANT

CHARLES NYOIKE MURUGI.....2ND DEFENDANT

JUDGEMENT

1. According to the appellant herein, the 1st Respondent herein was the registered owner and/or the driver of motor vehicle registration no. KAP 470S while the 2nd Respondent was the driver and/or either the actual but the unregistered owner of the same vehicle or otherwise had a beneficial or insurable interest therein.

2. It was pleaded by the appellant that on or about 18th January, 2014, he was a passenger in the said vehicle along Mwiku-Njiru road when the same collided with motor vehicle registration no. KBB 298F as a result of which the appellant sustained severe bodily injuries and suffered loss and damage. It was the appellant's case that the said accident was caused by the negligence or recklessness of the driver of the said vehicle. He proceeded to plead the particulars of negligence, injuries and special damages and claimed both general and special damages from the Respondents.

3. In his evidence the appellant called PW1, **Sgt Boru Buke Juma** a traffic police officer who testified that the accident in question involved about three vehicles, Reg Nos. KBB 298F Mitsubishi Lorry, KAP 470S Isuzu Tipper and KXS 077 Isuzu Lorry. According to him, the Appellant who was a passenger was issued with a police abstract and a p3 form which duly signed. It was his view that the 2nd Respondent, the driver of vehicle KAP 470S was to blame for the occurrence accident. He however stated that he was not the investigating officer in the said case rather it was **Police Constable Makori** who had since been transferred to Kitui. He stated that while the Appellant did not make any payment for the police abstract, he was instructed to appear in court to testify and was paid Kshs. 7,000.00. He accordingly produced the police abstract as P. Exhibit 1 and the P3 form as P. Exhibit 5.

4. On cross examination, he stated that he did not have the police file or the OB and that he attended court for purposes of producing the police abstract and the p3 form. He was however unable to tell how the accident occurred and since the investigation was complete, he could not confirm if the person blamed was charged. He retracted his earlier statement and stated that he could not say whether or not the investigations were complete since he did not have the police file.

5. **Dr. Cyprian Okoth Okere** (PW2) testified that he examined the Appellant on 17th March, 2016 who he confirmed had sustained a compound fracture in the left tibia and fibula injury and classified the said injuries as grievous harm. He therefore estimated the degree of permanent incapacity at 20%. He prepared a medical report in that respect at a cost of Kshs. 3,000.00 and charged court attendance fee of Kshs. 15,000.00. In his evidence, compound means there was a fracture and a bleeding on the site of the fracture and the fracture is exposed to the external environment and that the bone came out of the skin. He produced the medical report as P. Exhibit 6 and its receipt as P. Exhibit 12A and receipt for court attendance as P. Exhibit 13.

6. On cross examination, he pointed out that there was an error and clarified that the examination of the Appellant was conducted on 17th March, 2016. He admitted that the compound fracture was not been mentioned in the treatment documents from Kenyatta Hospital and that what was mentioned was the fracture of the tibia fibula and that the wound was dressed. He however did not look at the x-rays since the report was sufficient and clarified that the permanent incapacity was his personal assessment. According to him, when the two bones were fractured, there was permanent incapacity and that there was no shortening of the leg. He stated that the opinion varies from doctor to doctor.

7. The Appellant (PW3) testified that that on 18th January, 2014 he was involved in an accident while aboard KAP 470S. It was his testimony that the said vehicle hit another vehicle from behind. In his written statement, he stated that the said vehicle was recklessly driven by over speeding that it rammed into KBB 298F from the rear and as a result thereof, he sustained serious injuries on his left leg for which he was admitted at Kenyatta National Hospital for two (2) weeks then continued treatment as an outpatient. He stated that he still felt pain during cold season and that he could walk up stairs or on a steep place and that his leg swells and he has to wear slippers. He later reported the matter to Kayole Police Station where he was issued with a p3 form and a police abstract and was informed that the driver of KAP 470S was to blame for the accident. He stated that there were other motor vehicles involved in the same accident among them KXS 077. He attributed the accident to the KAP 470S and stated that his business stalled as a result of the accident yet his family is dependent on him.

8. On cross examination, he stated that he was a passenger in KAP 470S and that he was with the driver and another person. According to him, before the accident occurred, the vehicle in front stopped. It was his evidence that he went into shock and could not tell whether or not the 2nd Respondent stepped onto the breaks.

9. On his part the 2nd Respondent recorded a witness statement in which he averred on 18th January, 2014 at around 11.00 am, he was driving motor vehicle reg. no. KAP 470S from Njiru heading towards Mwiki along Kasarani Road. He was accompanied by the appellant herein who was his tout. It was his statement that he was driving at a speed of around Kshs 50km/hr. According to him, motor vehicle reg no. KBB 298F which was about 200 metres ahead of him suddenly stopped on the road just before the junction to Njiru Quarry. According to him, though he applied brakes, his vehicle which was going downhill did not stop so he swerved to the right and upon noticing another vehicle coming from the opposite side, returned to his lane and after the other vehicle passed he again attempted to serve to the was to blame for the accident for stopping on the road suddenly.

10. In his testimony, the 2nd respondent reiterated the contents of his statement and added that the Appellant had not fastened his seatbelt and that though he advised him and the other passengers to jump to the back, the appellant did not do so. He blamed the driver of KBB 298F for causing the accident by stopping at a place not designated for stopping. He stated that the vehicle he was driving was loaded with ballast. He further stated that he has never been charged with a traffic case.

11. In her judgement, the Learned Trial Magistrate found that it is not enough to simply plead negligence as it is upon the plaintiff to prove the same which the appellant failed to do in this case. According to the learned trial magistrate, from the evidence on record, the 2nd Respondent did all he could to avoid the accident but that the brakes failed hence there was very little he could do to avoid the accident. The court also found that the appellant did nothing to protect himself hence he could not entirely blame the 2nd respondent.

12. While the case was dismissed the court was of the view that it would have awarded the appellant Kshs 250,000.00 as general damages and Kshs 22,000.00 as special damages.

13. In the submissions filed on behalf of the appellant it is contended that the learned trial magistrate erred in law and in fact by holding that the Appellant had failed to prove his case against the Respondents on a balance of probability and the appellant cited **F M & Another vs. Joseph Njuguna Kuria & Another [2016] eKLR,** as well as **Boniface Waiti & Another vs. Michael Kariuki Kamau [2007] eKLR**.

14. According to the appellant, the magistrate therefore erred in law and in fact by imputing that the Appellant was to blame for his alleged failure to 'avoid the injury and he just refused and or ignored to act' in the sense that the Appellant had failed to jump to the back of the lorry. In further support he relied on **Stapley v. Gypsum Mines Ltd (2) (1953) AC 663** and submitted that it is not in dispute that the Appellant was in the driver's cabin together with the driver and a conductor. That the Appellant stated that he had his safety belts on and the same was never disputed. That as per the copy of records, the motor vehicle was an Isuzu lorry, which has a closed driver cabin. That the lorry was full of ballast, moving downhill at its top speed as it had just lost its brakes according to the 2nd Respondent. It was submitted that the magistrate's finding that the Appellant could have jumped to the back of the lorry to avoid the injuries is simply erroneous since it would even have been suicidal. That the Appellant also denied the driver ever having told them to jump to the back which is more probable as its quite impossible that the was expecting an accident. The Appellant cited **Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR** where it was held:

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station**."

15. It was submitted that it is not in dispute that the 2nd Respondent had been blamed in the police abstract which was produced as PEXh-1. That the fact that he was not charged with a traffic or criminal offence does not exonerate him from 'blame' as the standard of proof in civil matters is on a balance of probability, and not that of beyond a reasonable doubt as misapprehended by the learned magistrate. That the 2nd Respondent was under an obligation *'to drive prudently, be on the lookout for trouble shooters on the road, be vigilant and most importantly*

be able to control the vehicle and bring it to a safe stop in the event of an emergency' as was correctly observed in the case of **Boniface Waiti & Another** (Supra) which quoted the case of **Embu Public Road Services Ltd vs. Riimi [1968] 1 EA 22** in which the standard to be applied on a prudent driver was established.

16. According to the appellant, the failure of the driver to stop at a junction, losing his brakes and failure to have seen the oncoming vehicle (KXS077) is consistent with negligence. By the 2nd Respondent's own admission which was upheld by the Magistrate, the accident was not instant. The 2nd Respondent stated that he realized the lorry had stopped when there was a distance of about 200 metres. If his assertion that he was driving at a speed of 50 km/h is to be believed, if he had slowed down and or stopped by virtue of being in a junction, he could not have rammed into the stationary lorry.

17. It was submitted that though the 2nd Respondent blames the motor vehicle registration number KBB 298F and it was indicated that there was an intention to initiate third party proceedings so as to bring the owner and or driver of KBB 298F on board the appellant relied on the case of **James Gikonyo Mwangi vs. D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR**.

18. It was therefore submitted that having failed to institute third party proceedings, the 2nd Respondent could not therefore blame the driver of motor vehicle registration number KBB 298F for the accident.

19. According to the appellant, the 1st Respondent as the registered and or actual owner of the subject motor vehicle failed to enter appearance and file a defence; yet the 2nd Respondent was his servant and or agent hence he should be held vicariously liable for the actions of the 2nd Respondent and the Respondents should be jointly and severally held 100% liable.

20. On damages, it was submitted that the trial magistrate failed to take into account the relevant factors in assessment of damages, in finding that General Damages of Kshs. 250,000/= would have been sufficient compensation had the Appellant proved his case. In this regard the appellant relied on **John Kamore & another vs. Simon Irungu Ngugi [2014] eKLR** where it was held that:

> **"… this court is alive to the relevant factors considered in making awards. Normally courts consider the nature of injuries, the period of healing and whether the healing is full or partial, the residual incapacity if any, the inconvenience or deprivation encountered by the plaintiff, inflationary trends, cost of living and lapse of time from the time of any availed decided authorities.**
>
> **The plaintiff is only entitled to what is fair, just and reasonable. Money cannot renew a physical frame that has been shattered and battered. Assessment must be done with moderation. The aim is not to enrich the plaintiff. It is not also the aim to punish the defendant."**

21. Based on the medical report by **Dr. Cyprianus Okoth Okere** (PEXh-5), it was submitted that the Appellant sustained compound fracture of the left tibia and compound fracture of the left fibula. In the appellant's view, taking into account the nature of injuries sustained by the Appellant, the sum of Kshs. 1,000,000/= (One Million) as general damages for pain, suffering and loss of amenities would be fair and reasonable compensation to the Appellant herein and reliance was placed on **James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & Anor [2015] eKLR**, and C**harles Mwania & Another vs. Batty Hassan [2008] eKLR,** J**oseph Kitheka Vs Stephen Mathuka Pius [2000] eKLR**

22. On special damages, it was submitted that the learned magistrate misdirected herself by finding that '*those who issued the receipts should have testified on them and explained their purpose .'* since receipts are not expert's documents but belong to the Appellant and not the issuer. The Appellant had attached copies of the receipts when the claim was filed and the defence had ample time to scrutinize them and cross examine the Appellant on them during hearing. However, the receipts were produced as a bundle and no objection was raised on any of them. That the issue was only raised in the Respondent's submissions where only four receipts totalling Kshs. 4,871/= were faulted for having minor errors. That having pleaded and proved by way of receipts, the Appellant is entitled to medical and related expenses totalling Kshs. 64,331/=. It was submitted that the Doctor produced receipts for the medical report and his court attendance of Kshs. 3,000/= and 15,000/= respectively and the same should be awarded. That the Police sergeant (PW 1) stated that he had been paid Kshs. 7,000/= as court attendance. That receipt of Kshs. 500/= for the motor vehicle search was produced and the same had been pleaded and ought to be awarded. That the Appellant's claim is for a total Kshs. 89,831/= as special damages.

23. On costs and interest, it was submitted that that costs follow event. That should this Court find in favour of the Appellant, costs for the primary suit and this appeal as well as interest on General Damages from the date of judgment be awarded to the Appellant and that Interest on special damages should run from the date of filing of the primary suit.

24. The Respondents did not file any submissions in this appeal.

Determination

25. I have considered the submissions on record. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some**

point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

27. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

28. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

29. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

30. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

31. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."**

32. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

33. In this case, the appellant was clearly a passenger in motor vehicle registration no. KAP 470S. That vehicle, was no doubt being driven by the 2nd Respondent. The 1st Respondent did not however appear. In his evidence, the 2nd Respondent testified that he was 200 metres behind motor vehicle reg no. KBB 298F which vehicle stopped and the 2nd Respondent's vehicle failed. It was clear from his evidence that the 2nd Respondent had sufficient time to avoid the accident and that his inability to do so was due to the fact that the vehicle he was driving failed to come to a stop. The appellant in his plaint relied on the doctrine of *res ipsa loquitor*. In **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22**, the East African Court of Appeal held that:

> **"The doctrine of *res ipsa loquitor* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident… Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."**

34. Dealing with the said doctrine, the Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** expressed itself as hereunder:

> **"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of *res ipsa loquitor*…If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."**

35. However, in **Mary Ayo Wanyama & 2 Others vs. Nairobi City Council Civil Appeal No. 252 of 1998**, the same Court held that:

> "**It is not right to describe *res ipsa loquitor* as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was *prima facie* evidence of negligence and the onus lay on the defendant to rebut that *prima facie* case. It means the plaintiff *prima facie* establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety…*Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence."**

36. It is trite that drivers when driving carefully do not ordinarily lose control of the vehicles they are charged with. However, there may be circumstances that may lead to such loss of control without any negligence being attributed to the driver. It is however upon the driver to explain what led him to lose control of the vehicle and where no such evidence is forthcoming it must be presumed that the driver was negligent. **Okwengu, J** (as she then was) in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru NyerI HCCA No. 34 of 2002** held that:

> **"Where the deceased was a passive passenger in the motor vehicle and the evidence adduced shows that the accident was caused by a tyre burst and that the driver lost control of the motor vehicle, without an explanation how the accident occurred, the evidence was sufficient to establish on a balance of probabilities that there was negligence on the part of the Respondent's driver hence his inability to control the vehicle as a rear tyre burst would not ordinarily cause a motor vehicle to overturn if the vehicle is being driven at a reasonable speed with due care and attention."**

37. It is clear that vehicles do not ordinarily develop brake failures and without any reasonable explanation, mere brake failure cannot exonerate the driver of the vehicle.

38. In **Chinga Tea Factory Company Ltd vs. Miugu General Transport Co Ltd [1987] KLR 590, Aluoch, J** (as she then was) found that since the accident in question was caused by the braking system of the vehicle coupled with defective tyres these two factors showed negligence on the part of defendant in not keeping the vehicle in a good working order.

39. In **David Nandwa vs. Kenya Kazi [1988] KLR 488**, the court pronounced itself as hereunder:

> **"A motor vehicle which has its steering gear, by reason of wear, in imperfect condition that the driver is liable to lose control of the steering, is a thing which on a highway is necessarily dangerous to persons using the highway, and cause it to be driven on a highway amounts to negligence even in the absence of knowledge of the defect…The application of the doctrine of res judicata, which was no more than a rule of evidence affecting the onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but although it was the duty of the appellants to give an adequate explanation, if the facts were sufficiently known the question reached to be one of where the facts speak for themselves, and the solution must be found by determining whether or not on the established facts negligence is to be inferred…In any case, the owner of the motor vehicle will be found negligent where the defective vehicle is found on the road and the defendant will have to displace the allegations and all the facts proved…In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgement at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants… On the evidence a prima facie case of mechanical failure had been set up, because that is what the plaintiff said was the situation before the accident occurred. He was in hospital after the accident. He was not in a position to get the vehicle examined and indeed there was no examination. He relied on his experience at the accident, and that was the best evidence he could provide…The result was the plaintiff made out a case of mechanical failure, which was not met by the defence. It was the duty of the defendant company to keep its vehicle in good mechanical repair under the Road Traffic Act. It was also under a duty of care to the plaintiff to provide a safe system of working and not to expose him to risk. The defendant may have had a system of inspection of vehicles but it did not cover the eventuality in this case and consequently, the defendant was liable to the plaintiff**."

40. In this case the appellant was not the one in control of the vehicle and as was held in **Boniface Waiti & Another vs. Michael Kariuki Kamau [2007] eKLR**:

> **"It is now trite law that a passenger has no control over the manner of driving of a vehicle in which they are conveyed and they cannot be penalized for the poor workmanship of the control of the vehicle."**

41. In this case the evidential burden clearly shifted to the Respondents to prove that in the circumstances, the failure in the braking system was unavoidable. They could have proved this by for example showing the steps taken by them in maintaining the said vehicle. Having failed to do so, the Respondents could not escape liability.

42. In this case the Learned Trial Magistrate does not seem to have addressed her mind to the applicability of *res ipsa loquitor* to the case. Had she done so, I have no doubt that she would have arrived at a finding that the only evidence on record brought the case within that "doctrine". The Court seems not to have taken into account the provisions of sections 109 and 112 of the ***Evidence Act***. There was completely no evidence before the learned trial magistrate as to the state of the bakes before the Respondents embarked upon the journey. While the 2nd Respondent stated that from the vehicle inspection report, no pre-accident defects were noted, no such report was produced in evidence. In any case in **Manji Suleman Ladha and Others vs. R G Patel [1960] EA 38**, **Spry, Ag, J** (as he then was) held that:

> **"Vehicle Inspection Report is not a "public document", in that it is not intended for the use of the public or any section of the public, nor is it available for public inspection. The original of the form is for use of the owner of the vehicle, telling him what repairs or adjustments he ought to carry out to make the vehicle roadworthy: the duplicate is presumably for the use of the traffic police, so that they can check whether the necessary work has been done and if it has not been done can institute proceedings or notify the licensing authority, as may be appropriate. Secondly, the record is not in any sense a permanent one. There is no legal requirement that they be kept at all and from the practical aspect, there seems no good reason for keeping them once the vehicle has been made roadworthy or an order has been made under section 63(1) of the Traffic Ordinance…The underlying philosophy of section 35 of the Evidence Act seems to be that special credence can be given to records which have been prepared by responsible officials and which were intended to be enduring records. The wording of the section imports that the entry will be of a permanent nature…Consequently, the absence of any element of permanence would alone suffice to exclude these Vehicle Inspection Reports from the scope of section 35…Thirdly for records come within the provisions of section 35 of the Evidence Act, they must substantially be records of facts, even though section 35 itself merely refers to an entry, to be admissible, having to be an entry stating a fact. In general, and ignoring for the moment the particular document before the court, Vehicle Inspection Reports will be records of opinion and not of facts. The most important questions with which they are likely to deal, such as the degree of efficiency of brakes or steering or the question whether tyres are so worn as to be dangerous, are essentially matters of opinion, that is to say matters in respect of which the right of cross-examination may be vitally important."**

43. The learned trial magistrate seemed to have been influenced by the evidence by the 2nd Respondent that he asked the appellant to move to the back but the appellant declined. The evidence was however that the lorry was overloaded with ballast and the appellant was in the cabin with the 2nd Respondent. One wonders how the appellant was expected to move from the cabin of a moving lorry to the back. I agree with the appellant's submissions that such a move would have been in the circumstances unreasonable. I appreciate the position in **Daniel Kaluu Kieti vs. Mutuvi Ali Nyalo & another [2016] eKLR** where the Court held that:

> **"I find that the trial magistrate failed to appreciate the weight or bearing of circumstances admitted and proved hence, this**

court is entitled to interfere with that finding as to the negligence of the 1st defendant (see Peters Vs Sunday Post Ltd [1958] EA 424.) I do not see how the driver of the motor vehicle would have found it to be unsalable to ask his passengers to alight before attempting to go up the slope. In my view, going up when the vehicle was overloaded and the road muddy and slippery was an act of recklessness or carelessness on the part of the driver."

44. In this case not only was the inspection report not produced but, assuming it existed, its author was never called to testify.

45. As regards the issue of the role of the third party motor vehicle, registration no. KBB 298F, I associate myself with the position adopted by **Okwany, J** in **James Gikonyo Mwangi vs. D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR** that:

"… the suggestion or contention by the appellant that the respondent should have sued the third party owner of the unregistered motor vehicle [is] erroneous and misguided. This is so because passengers have no contract with third party vehicles on the road. The contract is with the owner and/or driver of the vehicle they are travelling in to drive them safely to their destinations. It is the appellant who had a contract with 3rd party vehicles on the road in respect to safe-driving and if the third party acted to his detriment, then I reiterated that the appellant should have called him to account through the third party proceedings."

46. In other words, it was incumbent upon the Respondents to take out third party proceedings against the owner of motor vehicle registration no. KBB 298F.

47. Whereas there was no evidence that the 2nd Respondent was charged, it was held by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

48. It is therefore my view and I find that the Learned Trial Magistrate failed to take account of particular circumstances or probabilities material to an estimate of the evidence and arrived at an erroneous conclusion. That justifies this Court in interfering with her decision.

49. In the premises this appeal succeeds, the decision dismissing the appellant's suit is hereby set aside and is hereby substituted with a judgement in favour of the appellant against the 2nd Respondent (since no evidence was adduced connecting the 1st Respondent with the ownership of the vehicle).

50. As regards the quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

51. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

52. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of

the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

53. Since the Learned Trial Magistrate, and rightly in my view, assessed the damages she would have awarded, which opinion I associate myself with, the appellant is hereby awarded Kshs 250,000.00 as general damages for pain suffering and loss of amenities. The said sum will accrue interest at court rates from the date of the judgement of the lower court till payment in full. As regards special damages, as the amount claimed was not seriously challenged, I further award the appellant Kshs 67,831/= as special damages to accrue interest at the same rate from the date of filing of the suit till payment in full.

54. The costs of the lower court and of this appeal are awarded to the appellant.

55. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 4th day of April, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Kioko for Mr Ngigi for the Appellant

CA Geoffrey